BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

OPPOSITION OF TELE-COMMUNICATIONS, INC. TO PETITION FOR PARTIAL RECONSIDERATION

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Tele-Communications, Inc. ("TCI") hereby submits this Opposition to the Petition for Partial Reconsideration of the Commission's Second Report and Order[1] in this proceeding filed by Wireless Cable Association International, Inc. ("WCA"). TCI participated in the initial phase of this proceeding, and thus is an interested party. See Commission Rules 1.106(b)(1) and 1.106(f).

The Commission should reject WCA's attempt to bootstrap a right to file program carriage complaints under Section 12 of the 1992 Cable Act from generalized pro-competitive statements in the Act and the legislative history. Heeding such an argument would not only ignore the literal language of the program

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[1] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order, MM Docket No. 92-265, FCC 93-457 (released October 22, 1993).

carriage and program access provisions of the Cable Act, but burden programmers, cable operators and the Commission with an obligation to respond to complaints based on mere suppositions of multichannel video distributors.

I. The Program Carriage Provisions of the Act are Solely for the Benefit of Program Vendors

Section 616 of the Communications Act governs certain aspects of the relationship between cable operators and other multichannel video programming distributors (including wireless cable providers) on the one hand, and video programming vendors on the other hand.[2] It directs the Commission to promulgate regulations: (1) to prevent any multichannel video programming distributor from requiring a financial interest in a program service; (2) to prohibit any multichannel video programming distributor from coercing a video programming vendor to provide the distributor with exclusive rights to carry its service or retaliating against a vendor who refuses to enter into an exclusive arrangement; and (3) to prevent any multichannel video provider from engaging in conduct which unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly by discriminating among vendors on the basis of affiliation or non-affiliation.[3]

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[2] 47 U.S.C. § 536(a); Communications Act of 1934 (as amended), § 616(a).

[3] 47 U.S.C. § 536(a)(1)-(3); Communications Act of 1934, as amended, § 616(a)(1)-(3).

WCA would have the Commission believe that Section 616 deputizes multichannel video distributors as "carriage agreement police" with the power, simply by filing a complaint, to force a competitor and its vendor to prove that the vendor's rights under Section 616 were not violated in the process of arriving at their carriage agreement. As discussed below, WCA's Petition conveniently and consistently ignores both the potential for havoc and mischief that such deputation would cause and the fact that the rights of multichannel video programming distributors as against one another are addressed not in Section 616, but in the program access provisions of the Act.[4] Moreover, such deputation is at odds with the language of Section 616 and its legislative history.

Section 616 addresses the treatment of programming vendors at the hands of programming distributors and, as outlined above, directs the Commission to prohibit certain types of conduct by programming distributors. Notably, Section 616 provides for expedited review of "complaints made by a video programming vendor pursuant to this section"[5] and goes on to define exactly what a "video programming vendor" is.[6] There is no mention in Section 616 of complaints to be filed by

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[4] 47 U.S.C. § 548; Communications Act of 1934 (as amended), § 628.

[5] 47 U.S.C. §536(a)(4); Communications Act of 1934 (as amended), § 616(a)(4).

[6] 47 U.S.C. § 536(b); Communications Act of 1934 (as amended), §616(b).

multichannel video programming distributors; complaints which WCA alleges it is entitled to file in some sort of novel representational capacity on behalf of a video programming vendor it unilaterally determines to be too docile to file a complaint on its own accord. The Commission should decline WCA's entreaties that it create such an entitlement in the face of Section 616(a)(4)'s reference to complaints filed by a "video programming vendor."

Nowhere in the legislative history of Section 616 is there any support for the notion that one multichannel video programming distributor is permitted to use that section as a sword against another one under the guise of enforcing a programming vendor's rights. In fact, the legislative history of Section 616 compels precisely the opposite conclusion.

If WCA is to prevail in its efforts to obtain a right on the part of multichannel video providers to file complaints under Section 616, it must necessarily convince the Commission to adopt a tortured reading of Section 616(a)(4). It must convince the Commission that Section 616(a)(4) merely requires the Commission to give expedited treatment to Section 616 complaints filed by a programming vendor, while allowing anyone else to file a Section 616 complaint on a non-expedited basis. But the legislative history expressly rejects the notion of non-expedited Section 616 complaints; instead stating that all such complaints must be given expedited treatment.

The Conference Report states that Section 616(a)(4) provides for "expedited review of any complaints brought pursuant to" Section 616.[7] The House Report similarly states: "The FCC's regulations shall provide for expedited review of complaints made pursuant to this section. . . ."[8] Both the House and Conference Reports thus confirm the self-evident meaning of Section 616(a)(4) -- that only programming vendors may file complaints under Section 616.

The legislative history of Section 616 not only belies the statutory interpretation essential to WCA's Petition, but the policy concern that purports to underlie it. WCA claims that unless multichannel video distributors are given the right to file complaints under Section 616, cable operators will be able to coerce both exclusivity and silence from programming vendors and thus render Section 616 a "paper tiger."[9] WCA's claim conveniently ignores the fact that Section 616(a)(2) prohibits a multichannel video programming distributor not only from coercing exclusivity a programming vendor, but also from "retaliating against such a vendor for failing to provide" exclusivity.[10]

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[7] H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 82 (1992) (emphasis supplied) (hereafter "Conference Report").

[8] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 111 (1992) (emphasis supplied).

[9] WCA Petition at 5.

[10] 47 U.S.C. § 536(a)(2); Communications Act of 1934 (as amended), § 616(a)(2).

The decision on the part of the House-Senate conferees to adopt the anti-retaliation provision contained in the House version of Section 616[11] and the rules implementing the anti-retaliation provision[12] give teeth to Section 616 by giving a programming vendor an opportunity for prompt and full redress if its rejection of a coercive demand for an exclusive arrangement is met with retaliation by a multichannel video programming distributor. The availability of an express statutory remedy for such retaliation voids any claim by WCA that Section 616 will be rendered a paper tiger unless its members are permitted to enforce the rights of programming vendors thereunder.

II. The Program Access Provisions Provide a Mechanism For Multichannel Video Programmer Distributor Complaints Relating to Exclusive Programming Contracts

Nowhere does WCA's Petition discuss the extensive rights granted to multichannel video program distributors to challenge exclusive contracts under the program access provisions of the Act. WCA's Petition thus misleadingly reads as if multichannel video programming distributors would be left without a way in which to challenge exclusive programming contracts if they are not permitted to file complaints to enforce the rights of programming vendors under Section 616.

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[11] Conference Report at 82-83. The absence of an anti-retaliation provision from the Senate version of Section 616 was the most significant difference between the otherwise almost identical House and Senate versions.

[12] 47 C.F.R. § 76.1301(b)

Section 628 of the Act and the rules promulgated thereunder address exclusive programming contracts in great detail and define the circumstances under which such contracts are proscribed.[13] In fact, the rules require prior Commission approval of many exclusive programming arrangements and expressly provide any competing multichannel video programming distributor affected by the proposed exclusivity the opportunity to file an opposition to the petition for approval.[14] Even in circumstances where pre-approval of exclusivity contracts is not required, a multichannel video programming distributor is permitted to commence an adjudicatory proceeding for any conduct, including an exclusivity arrangement, that it alleges to constitute a violation of Section 628.[15]

Section 628, not Section 616, provides that its purpose is to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market. . . ."[16] Section 628 and the rules thereunder seek to promote this stated statutory purpose by prohibiting certain exclusive programming contracts outright and requiring that others be proven by the parties thereto to be in

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[13] See, e.g., 47 U.S.C. § 548(c)(2)(C)-(D) and (c)(4), Communications Act of 1934 (as amended), §§ 628(c)(2)(C)-(D) and (c)(4); 47 C.F.R. § 76.1002(c).

[14] 47 C.F.R. § 76.1002(c)(5).

[15] 47 C.F.R. § 76.1003.

[16] 47 U.S.C. § 548(a); Communications Act of 1934 (as amended), § 628(a).

the public interest. WCA apparently believes that it not only should have the right to contest whether a given exclusive contract is in the public interest, but also be able to have the contract voided under Section 616 notwithstanding the fact that it is in the public interest.

While there is an obvious pecuniary motive for WCA's position, there is no policy rationale underlying it. The drafters of the Act and the regulations covered all the bases by allowing exclusive contracts to be contested by third parties under Section 628 to determine if they are in the public interest and allowing video programming vendors to utilize Section 616 to protect themselves from any coercive tactics that might be employed by multichannel video programming distributors. Thus there is both a substantive and procedural check on exclusive contracts and the interests of both the marketplace and the contracting parties themselves are accounted for. If third parties cannot demonstrate that an exclusive contract is detrimental to the public interest, then a fortiori there is no policy rationale for allowing them a second opportunity to void the contract by making a bald assertion that, despite the Act's anti-retaliation provisions, a video programming distributor was coerced into entering into an exclusive contract.

III. Allowing Multichannel Video Programmer Distributors to File Complaints Under Section 616 Invites the Potential for Abuse

A multichannel video programming distributor confronted with a competitor's exclusive contract for a particular programming service has scant incentive not to challenge the exclusive contract by any means available. As the Commission has recognized, exclusive contracts are often in the public interest and promote the availability of a wider range of viewing alternatives. Yet, allowing an MVPD to utilize Section 616 to challenge any and all exclusive contracts as coercively obtained will discourage such contracts -- even those in the public interest. This is so because the parties contemplating an exclusive arrangement will face the specter that, at the behest of an interested third party, the Commission will examine not only the carriage agreement itself, but all of the negotiations and give and take leading up to its execution to determine if it was coercively obtained.[17] At the very least, under the guise of acting as some sort of private attorney general, the MVPD will be able to attempt to obtain potentially useful information regarding a rival's business practices and/or chill exclusive contracts that are in the public interest.

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[17] WCA does not explain why a video programming distributor presumably too cowered to file a complaint under Section 616 of its own accord will suddenly admit to being coerced into an exclusive arrangement merely because a third party files a complaint with the FCC on its behalf.

The concern expressed above is not a theoretical one. In its Petition, WCA states that its members "believe" that TCI has coerced cable exclusivity for Fox's FX programming service.[18] No basis is stated for this belief; which is totally groundless and without merit. Yet, if WCA's Petition prevails, it could file a complaint under Section 616 and attempt to delve into the intimate details of the business relationship between TCI and Fox. Even the remote possibility that it could glean competitively useful information from such a complaint would make it well worth the effort, even if it ultimately lost on the merits.

IV. Conclusion

TCI respectfully requests the Commission to deny WCA's Petition for Partial Reconsideration for the reasons set forth above.

Respectfully submitted,

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[18] WCA also cites statements of Sumner Redstone, chairman of Viacom International, Inc., before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, to the effect that TCI has engaged in anti-competitive practices. These unsubstantiated allegations, curiously made at the time Viacom was competing with QVC (a TCI affiliate) to acquire Paramount, are untrue.

CERTIFICATE OF SERVICE

In reference to the above-captioned filing, I hereby certify that, on May 24, 1994, a copy of the Opposition of Tele-Communications, Inc. to Petition for Partial Reconsideration was served by First Class Mail, postage prepaid to the following:

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